Supreme Court, U. S.
FILED
NOV 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-639

UNITED STATES OF AMERICA, *Petitioner,*

v.

SIOUX NATION OF INDIANS, *et al., Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION

ARTHUR LAZARUS, JR., ESQUIRE
Fried, Frank, Harris, Shriver
& Kampelman
600 New Hampshire Avenue, N.W.
Suite 1000
Washington, D.C. 20037
(202) 342-3624

Of Counsel:

MARVIN J. SONOSKY, ESQ.
Sonosky, Chambers & Sachse
2030 M Street, N.W.
Washington, D.C. 20036

WILLIAM HOWARD PAYNE, ESQ.
1086 National Press Bldg.
14th & F Streets, N.W.
Washington, D.C. 20045

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
STATEMENT	1
QUESTION PRESENTED	5
TREATY PROVISION INVOLVED	5
REASONS FOR DENYING THE PETITION	5
1. The decision below does not conflict with *Lone Wolf* or any other holding of this Court	5
2. The Court of Claims' holding in this case turns upon a unique set of facts and establishes no broad precedent which this Court should review	9
(a) The "good faith" test	9
(b) Impact on other Indian claims	13
3. The rule in taking cases which petitioner advocates would deny Indian tribes the equal protection of the law	15
CONCLUSION	19

CITATIONS

CASES:

Cherokee Nation v. *Southern Kansas R. Co.*, 135 U.S. 641 (1890) 8

Confederated Salish and Kootenai Tribes v. *United States*, 437 F.2d 458 (Ct. Cl. 1971) 11, 14

Delaware Tribal Business Comm. v. *Weeks*, 430 U.S. 73 (1977) 8, 16, 19

Federal Power Comm. v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960) 8, 15

Klamath & Modoc Tribes v. *United States*, 436 F.2d 1008 (Ct. Cl. 1971) 10

Lane v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919) ... 6, 8

Lone Wolf v. *Hitchcock*, 187 U.S. 553 (1903) ..5, 6, 7, 8, 9, 16

Page

Menominee Tribe of Indians v. *United States*, —— F.2d —— (Ct. Cl. October 17, 1979) 17

Morton v. *Mancari*, 417 U.S. 535 (1974) 8, 16

Morton v. *Ruiz*, 415 U.S. 199 (1974) 18

Seminole Nation v. *United States*, 316 U.S. 286 (1942) 18

Shoshone Tribe v. *United States*, 299 U.S. 476 (1937).. 7, 8, 9, 19

Sioux Nation v. *United States*, 33 Ind. Cl. Comm. 151 (1974) 2

Sioux Tribe of Indians v. *United States*, 97 Ct. Cl. 613 (1942) 3

Tee-Hit-Ton Indians v. *United States*, 348 U.S. 272 (1955) 14

Three Affiliated Tribes of the Fort Berthold Reservation v. *United States*, 390 F.2d 686 (Ct. Cl. 1968).. 9, 10, 11, 14

Three Affiliated Tribes of the Fort Berthold Reservation v. *United States*, 204 Ct. Cl. 831 (1974), *aff'g* 28 Ind. Cl. Comm. 264 (1972) 10

United States v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951) 14

United States v. *Creek Nation*, 295 U.S. 103 (1935) ..7, 8, 9

United States v. *Klamath & Moadoc Tribes*, 304 U.S. 119 (1938) 7, 9, 19

United States v. *Mille Lac Band of Chippewas*, 229 U.S. 498 (1913) 6

United States v. *Pueblo of Taos*, 515 F.2d 1404 (Ct. Cl. 1975) 11

United States v. *Sioux Nation of Indians*, 518 F.2d 1298 (Ct. Cl. 1975) 2, 3, 4, 12

Yankton Sioux Tribe v. *United States*, 272 U.S. 351 (1926) 7

Page

CONSTITUTION, TREATY AND STATUTES:

United States Constitution, Fifth Amendment 1, 5, 6, 7, 9, 14, 15, 16, 17, 18

Treaty of April 29, 1868, 15 Stat. 635 .....2, 3, 5, 6

Act of August 15, 1876, 19 Stat. 176 .....3, 4, 12

Act of February 28, 1877, 19 Stat. 254 .....3, 4, 12, 16

Act of October 27, 1974, 88 Stat. 1499 12

Indian Claims Commission Act of 1946, 60 Stat. 1049..4, 13, 14, 15

25 U.S.C. 70a 4, 15

25 U.S.C. 70k 14, 15

28 U.S.C. 1505 15

MISCELLANEOUS:

Final Report of the United States Indian Claims Commission, August 13, 1946-September 30, 1978 15

Henkin, "Is There a 'Political Question' Doctrine?", 85 Yale L.J. 597 (1976) 16

House Report No. 1466, 79th Cong., 1st Sess. (1945) .. 13

House Report No. 2693 (Conf. Rep. on H.R. 4497), 79th Cong., 2d Sess. (1946) 13

Senate Report No. 1715, 79th Cong., 2d Sess. (1946) .. 13

Tribe, AMERICAN CONSTITUTIONAL LAW, 71-9 (1978) ... 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-639

UNITED STATES OF AMERICA, *Petitioner,*

v.

SIOUX NATION OF INDIANS, *et al., Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Sioux Nation of Indians, *et al.,* respectfully request that this Court deny the petition for a writ of certiorari, which seeks review of the Court of Claims' decision in the Sioux Black Hills case. The opinion below is reported at 601 F.2d 1157 (Ct. Cl. 1979) and is reprinted in Appendix A (hereinafter "App. ——") of the petition at pp. 1a-70a.

STATEMENT

Over 100 years after the wrong occurred and more than 50 years after this suit first was instituted, the Court of Claims finally entered a judgment awarding the Sioux Nation just compensation under the Fifth Amendment for the 1877 taking of 7,345,157 acres of tribal reservation land, which the United States, by

treaty, had promised the Sioux forever. The events giving rise to the Black Hills claim, summarized in the findings of the Indian Claims Commission (*Sioux Nation* v. *United States,* 33 Ind. Cl. Comm. 151, 247-57 (1974)) and by the court below, constitute an unparalleled example of governmental bad faith and injustice that is even today the cause of much Indian resentment. In order to downplay this damaging background —so inimical to any argument for further judicial review—the petitioner's statement of the case omits or glosses over the following significant facts:

1. Under the Treaty of April 29, 1868, 15 Stat. 635, with the Sioux Nation, the United States promised that the Great Sioux Reservation would be "set apart for the absolute and undisturbed use and occupation of the Indians. . ." (Art. 2). In 1875, following the discovery of gold on the Indians' land, the President, the Secretary of the Interior and the Secretary of War commenced a concerted and, at least in part, unlawful campaign to coerce the Sioux into relinquishing the gold-rich Black Hills portion of the reservation. *United States* v. *Sioux Nation of Indians,* 518 F.2d 1298, 1299-1300 (Ct. Cl. 1975), *cert. denied* 423 U.S. 1076. First, the President secretly removed the troops guarding the Great Sioux Reservation and, in violation of Article 2 of the 1868 Treaty, permitted miners and settlers to invade the Black Hills. Second, the Secretary of the Interior prohibited the Sioux from hunting in the Powder River country outside their reservation, as they had a right to do under Articles 11 and 16 of the 1868 Treaty, and, when severe winter weather prevented the Sioux from returning to the reservation before the Government's deadline, the Secretary of War declared all Sioux outside the reservation to be "hostiles," meaning men, women and children could be shot on sight. Finally, the Sioux forced back onto the reservation were disarmed and dismounted, and thus deprived of any means of subsistence. Based upon such evidence,[1] showing the "duplicity of President Grant's course and the duress practiced on the starving Sioux," the Court of Claims said of the Government's conduct that "[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history. . . ." 518 F.2d, *supra,* at 1302.

2. Under the 1868 Treaty, the United States further promised the Sioux that "[n]o treaty for the cession of any portion or part of the reservation . . . shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians . . ." (Art. 12). Eight years after this commitment was made—and at a time of national anger over General Custer's defeat at Little Big Horn—Congress attached a rider to the Indian Appropriations Act of August 15, 1876, 19 Stat. 176, 192, establishing a commission to treat with the Sioux for acquisition of the Black Hills country, but also providing that the Sioux would receive no further rations until they relinquished all rights out-

[1] Petitioner asserts (Pet. 6) that the court below ruled in this case "on the same record" considered in *Sioux Tribe of Indians* v. *United States,* 97 Ct. Cl. 613 (1942). This statement is not correct. In proceedings before the Indian Claims Commission, the Sioux submitted over 500 additional exhibits concerning the background of the 1877 Act, exclusive of valuation evidence, which had not been presented in the 1942 case. 518 F.2d at 1301. Indeed, as late as 1975, the Court of Claims took judicial notice of three newly-discovered documents proving President Grant's hitherto secret breach of the 1868 Treaty. *Id.* at 1299.

side the Great Sioux Reservation and ceded the Black Hills to the United States (App. 7a-8a). Although given this Hobson's choice of sell or starve, less than 10% of the adult male Sioux approved the so-called cession Agreement of September 26, 1876 (App. 8a, 25a). The Act of February 28, 1877, 19 Stat. 254, which transmuted the 1876 "Agreement" into law, thus effected the unilateral extinguishment of Sioux title to the Black Hills.[2] (App. 9a; 518 F.2d at 1300.)

3. The legislative history of the "sell or starve" rider to the Act of August 15, 1876, *supra,* which authorized negotiation of the 1876 "Agreement", demonstrates that Congress did not even relate, much less equate, the value of rations to be given the Sioux to the value of the Black Hills gold country (App. 18a-20a). Similarly, the legislative history of the 1877 Act reveals that Congress, in undertaking to provide rations to those Sioux who labored or attended school "until the Indians are able to support themselves", thought of this conditional promise as a substitute for the Indians' hunting, not as a reasonable equivalent for their land (App. 21a-24a). As the Court of Claims found, "[t]he terms upon which Congress acquired

[2] In petitioner's statement, the quintessential fact that the 1876 "Agreement" had been rejected by the Sioux is relegated to a footnote. Pet. 4, n.1. Thereafter, petitioner artfully blurs the critical distinction between claims grounded upon a unilateral taking of Indian reservation land, as in this case, which are cognizable under section 2, clause 1, of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70a, and claims which would result if an otherwise valid treaty or agreement by which Indians consented to a land cession were revised on the ground of unconscionable consideration, which claims comprise the bulk of the cases presented to the Commission, are cognizable under section 2, clause 3, of that Act, and do not call for the payment of interest. *See, e.g.,* Pet. at 12-13.

the Black Hills were not the product of any meaningful negotiation or arm's-length bargaining, and did not reflect or show any considered judgment by Congress that it was paying a fair price" (App. 25a).

In light of these additional facts, the real issue presented by this case is not accurately described in the question posed by petitioner.

QUESTION PRESENTED

Whether the United States, under circumstances constituting a legislative taking of private property, nonetheless need not pay just compensation under the Fifth Amendment because the land belongs to an Indian tribe and Congress has authorized some payment, no matter how arbitrary or inadequate in amount.

TREATY PROVISION INVOLVED

Article 12 of the Treaty of April 29, 1868, *supra,* between the United States and the Sioux Nation, provides in material part:

> No treaty for the cession of any portion or part of the reservation herein described [Great Sioux Reservation] which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same * * *.

REASONS FOR DENYING THE PETITION

1. The Decision Below Does Not Conflict With Lone Wolf Or Any Other Holding Of This Court.

Petitioner's principal argument for grant of the writ is its assertion that the decision of the Court of

Claims "is inconsistent with this Court's ruling in *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903) . . ." (Pet. 8). The argument has no merit.

Lone Wolf v. *Hitchcock, supra,* was an action to enjoin the Secretary of the Interior from allotting and selling tribal land under a 1900 Kiowa-Comanche statute on the ground that the law was unconstitutional. The plaintiff Indians there contended that Congress possessed no right to divest the tribe of title unless three-quarters of the adult male Indians agreed in writing to the land cession, as required under the provisions of a treaty comparable to Article 12 of the 1868 Sioux Treaty. This Court held that Congress had the plenary power to break a treaty with an Indian tribe unilaterally. In so ruling, the Court declared that, since "Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which promoted the enactment of this legislation" (187 U.S. at 568). The case turned upon the constitutional power of Congress to act, not upon the legal or economic consequences which ultimately might flow from the disputed legislative action.

The Court in *Lone Wolf* had no occasion to pass upon whether the Kiowa-Comanche statute gave rise to a claim for just compensation under the Fifth Amendment because that question was not then open for adjudication.[3] The United States was not a party

[3] *Lane* v. *Pueblo of Santa Rosa,* 249 U.S. 110 (1919), cited by petitioner for the proposition that "the Court . . . had to conclude that the challenged statute would work no unconstitutional taking, else an injunction would have issued" (Pet. 10), is not in point. The Court in *Lane* enjoined unauthorized Executive action, not the implementation of an act of Congress. *See also, United States* v. *Mille Lac Band of Chippewas,* 229 U.S. 498, 509-10 (1913).

and had not consented to suit. As the Court declared, "[i]f injury was occasioned . . . by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts." 187 U.S. at 568. In 1903, of course, no court had jurisdiction to hear and determine Indian tribal claims, including taking cases. Pet. 7, n.7.

Respondents submit, therefore, that the decision below, which is limited to whether a taking occurred and just compensation thus is due, clearly does not and cannot conflict with *Lone Wolf*. Indeed, after a far more exhaustive analysis of the issues presented in *Lone Wolf* than would be appropriate for this Opposition, a majority of the Court of Claims,[4] sitting *en banc,* reached precisely this conclusion (App. 28a-33a). The opinion below also is consistent with, and fully supported by, all other decisions of this Court on Indian land claims.

Specifically, this Court has established in an unbroken line of cases that *Lone Wolf* does not preclude an award of just compensation under the Fifth Amendment—where Congress has subjected the United States to suit—whenever the Government, without the Indians' consent, acquires tribal land held by recognized title without payment of fair market value. *United States* v. *Klamath & Moadoc Tribes,* 304 U.S. 119 (1938); *Shoshone Tribe* v. *United States,* 299 U.S. 476 (1937); *United States* v. *Creek Nation,* 295 U.S. 103 (1935); *see also, Yankton Sioux Tribe* v. *United*

[4] Chief Judge Friedman, author of the opinion below, was joined by Senior Judge (and former Chief Judge) Cowen, Judge Davis and Judge Smith.

States, 272 U.S. 351 (1926).[5] In *Shoshone Tribe* v. *United States, supra,* the Court expressly juxtaposed the plenary power of Congress, as confirmed in *Lone Wolf,* with the constitutional obligation to pay just compensation, in the following terms:

> Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. Lone Wolf v. Hitchcock, 187 U.S. 553, 564-566, 23 S. Ct. 216, 47 L. Ed. 299. The power does not extend so far as to enable the Government "to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . .; for that 'would not be an exercise of guardianship, but an act of confiscation' " [citing *United States* v. *Creek Nation, supra,* and *Lane* v. *Pueblo of Santa Rosa, supra*]. (299 U.S. at 497.)[6]

[5] Prior to *Lone Wolf,* the Court had pointed out in *Cherokee Nation* v. *Southern Kansas RR. Co.,* 135 U.S. 641 (1890):

> "The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; *provided only, that they are not taken without just compensation being made to the owner.*" (135 U.S. at 657; emphasis added.)

This passage from *Cherokee Nation* was cited favorably in conjunction with *Lone Wolf* by the Court in *Federal Power Comm.* v. *Tuscarora Indian Nation,* 362 U.S. 99, 121-3 (1960).

[6] Given *Shoshone Tribe,* no basis exists for petitioner's contention, never thereafter explained, that the decision below "unduly restricts congressional power to manage Indian property" (Pet. 8). The standard for judicial review of legislation affecting Indian property is set forth in this Court's recent decisions in *Morton* v. *Mancari,* 417 U.S. 535, 555 (1974), and *Delaware Tribal Business Comm.* v. *Weeks,* 430 U.S. 73, 84-5 (1977). In *Mancari,* the Court made clear that acts of Congress will be sustained if "tied rationally to the fulfillment of Congress' unique obligation toward the Indians. . . ." 417 U.S. at 555. This standard gives Congress ample latitude in its management of Indian property. But, as Mr. Justice Cardozo observed, speaking for a unanimous Court in *Shoshone Tribe:* "Spoliation is not management." 299 U.S. at 498.

Furthermore, the principle that the United States must pay just compensation under the Fifth Amendment for the unilateral extinguishment of tribal title to reservation land applies whether Congress has paid no consideration (*United States* v. *Creek Nation, supra*) or merely an inadequate consideration (*United States* v. *Klamath & Moadoc Tribes, supra*).[7] In short, based upon all prior precedents in this Court, the decision below is correct.

2. The Court Of Claims' Holding In This Case Turns Upon A Unique Set Of Facts And Establishes No Broad Precedent Which This Court Should Review.

(a) *The "good faith" test:* In an attempt to reconcile the plenary power of Congress, reflected in *Lone Wolf,* and the constitutional obligation to pay just compensation for the taking of tribal reservation lands, as determined in *Klamath, Shoshone Tribe* and *Creek Nation, supra,* the Court of Claims has established a "good faith" test for Fifth Amendment

[7] Petitioner tries to distinguish *Klamath & Moadoc Tribes* on the ground that the payment there made was "derisory." Pet. 11. Petitioner does not suggest how or where a constitutional line can be drawn between a "derisory" payment, as allegedly occurred in *Klamath,* and an "arbitrary" payment, as certainly occurred in this case—and no such line appears in any opinion of this Court. As the Court of Claims has declared, "[t]here is no basis in reason to distinguish between no compensation, minimal compensation, or compensation arbitrarily determined." *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States,* 390 F.2d 686, 695 (Ct. Cl. 1968).

claims. In the lead case of *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States,* 390 F.2d 686 (Ct. Cl. 1968), the court below concluded:

> . . . it is the good faith effort on the part of Congress to give the Indians the full value of their land that identifies the exercise by Congress of its plenary authority to manage the property of its Indian wards for their benefit. Without that effort, Congress would be exercising its power of eminent domain by giving or selling Indian land to others, by dealing with it as its own, or by any other act constituting a taking. (390 F.2d at 693.)

The majority of the Court of Claims, as well as Judge Nichols in his concurring opinion, applied the above-described good faith test as the controlling precedent for determining whether a taking had occurred in this case (App. 9a-12a, 39a-48a).[8]

Initially, the *Fort Berthold* good faith test served the United States well. Thus, the court below denied the Fort Berthold Indians just compensation even though the Government, in an unconsented statutory acquisition, had paid only $1,661,954 for tribal reservation land having a fair market value of $4,427,021. *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States,* 204 Ct. Cl. 831 (1974), *affirming* 28 Ind. Cl. Comm. 264, 278-9 (1972); *see also, Klamath and Modoc Tribes* v. *United States,* 436 F.2d 1008,

[8] Respondents believe that the *Fort Berthold* good faith test is erroneous and that Indian tribes, like all other persons, are entitled to just compensation when the United States acquires their property without their consent for *any* amount less than fair market value. *See* pp. 15-18, *infra.* This question, however, need not be reached in considering the petition for a writ of certiorari because, even under the restrictive standard of the good faith test, the court below held the Sioux entitled to just compensation.

1015-17 (Ct. Cl. 1971). In other litigation involving inadequate consideration and a lack of tribal consent, however, the Court of Claims found that Congress had not made a good faith effort to pay the Indians a fair equivalent for their property and, accordingly, awarded interest as a measure of just compensation. *Confederated Salish and Kootenai Tribes* v. *United States,* 437 F.2d 458, 459-60 (Ct. Cl. 1971); cf. *United States* v. *Pueblo of Taos,* 515 F.2d 1404, 1405-6 (Ct. Cl. 1975).

In advising the Court that, "[t]o date, all successful claims based on inadequate consideration—as opposed to no payment at all—have been awarded without interest, with only the relatively insignificant exception of the school lands in the *Fort Berthold* case" (Pet. 13), petitioner seems to have forgotten *Confederated Salish and Kootenai Tribes, supra,* in which a taking was found when the United States had paid only $1,344,000 for property having a fair market value of $7,410,000 (437 F.2d at 469). This oversight perhaps explains petitioner's patently inaccurate contentions that "the pattern in the Court of Claims has been" to award just compensation only where no payment has been made (Pet. 11-12), and that the court below disregarded its own precedents (*id.* at 8). Actually, the Court of Claims has invoked the *Fort Berthold* good faith test in every Indian taking case under consideration since that rule was promulgated in 1968.

Petitioner's real complaint in this case is that the Court of Claims has decided on the facts that Congress failed the good faith test. On the basis of a massive evidentiary record, that court, in its 1975 opinion, properly characterized the Government's conduct giving rise to the Black Hills claim as probably the most

"ripe and rank case of dishonorable dealings . . . [to] be found in our history. . . ." (518 F.2d at 1302; *see* pp. 2-3, *supra.*) Similarly, after a detailed study of the legislative history of the 1877 Act and, more particularly, the "sell or starve" rider to the Appropriations Act of August 15, 1876, which authorized negotiation of the 1876 "Agreement" (App. 18a-24a), and a further analysis of the conditional commitments undertaken by the Government (*id.* at 26a-27a), a majority of the court below determined, and Judge Nichols emphatically concurred, that "[t]here is no indication that Congress believed that, or even considered whether, the obligation it assumed to furnish the Sioux with rations until they could support themselves, constituted the fair equivalent of the value of the lands the United States was acquiring from them." (App. 26a, 47a-48a; *see* pp. 4-5, *supra.*) Thus, contrary to petitioner's assertion (Pet. 10), the Court of Claims did not presume bad faith, but rather affirmatively found that Congress had not acted in good faith when it took Sioux land without attempting to pay fair market value. That ultimate factual conclusion, and not any issue of law, is the essence of the decision below and plainly does not warrant exercise of certiorari jurisdiction by this Court.[9]

[9] As a counter to the Court of Claims' finding, petitioner asserts that "rations valued at approximately $43 million were provided" the Sioux (Pet. 4), and that such payment "was in fact overgenerous" (*id.* at 11). Apart from the principle that what the United States eventually may have spent is irrelevant to whether a taking initially took place (App. 27a-28a), neither of petitioner's statements is true. First, as the court below correctly pointed out, the Government's claim that $43 million was expended for Sioux rations is contested by respondents (App. 9a), but was not litigated in view of the Act of October 27, 1974, 88 Stat. 1499, eliminating expenditures for "food, rations, or provisions" as an offset. Second, assuming such sum had been expended during the period 1877-1942 (*ibid*), $43 million over a 65-year period is only $661,154 per year or approximately $200,000 less each year than the $855,174 that the principal sum of $17,103,484, representing the fair market value of the Black Hills, would have earned at the agreed 5% interest rate. A substantial annual underpayment of just compensation is hardly "overgenerous."

(b) *Impact on other Indian claims:* In order to create the illusion that this case involves an important legal question, petitioner alleges that, when the Indian Claims Commission Act was adopted, Congress "presumably contemplated" that most Indian claims based upon recognized title would fall into the class of unconscionable consideration cases and that the decision below, if generally followed, "would defeat that expectation." Pet. 12, 13; *see* p. 4, n.2, *supra.* Petitioner cites no authority for this sweeping generalization concerning legislative intent, and no authority for the proposition in fact exists. The committee reports on H.R. 4497 of the 79th Congress, which became the Indian Claims Commission Act, certainly give no indication that Congress intended any particular class of claims to predominate and, far from favoring unconscionable consideration cases, the Senate Committee on Indian Affairs at one point deleted any specific reference to that basis for the Commission's jurisdiction from the pending bill.[10]

Petitioner's further contention that an unidentified "dozen cases still pending in the Court of Claims may be governed by the rule" applied in this case (Pet. 13)

[10] *See* Sen. Rep. No. 1715, 79th Cong., 2d Sess., p. 5 (1946); House Rep. No. 1466, 79th Cong., 1st Sess., pp. 10-11 (1945); House Rep. No. 2693 (Conference Report on H.R. 4497), 79th Cong., 2d Sess., pp. 1, 5-6 (1946).

appears equally inaccurate. As previously pointed out (pp. 10-11, *supra*), the decision below follows *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States, supra,* and *Confederated Salish and Kootenai Tribes* v. *United States, supra,* without breaking new legal ground. Petitioner suggests no reason why the Sioux opinion, unlike *Fort Berthold* and *Confederated Salish,* should lead to a rash of new Indian land taking claims.[11]

Moreover, true just compensation cases are especially rare in the Indian context. A Fifth Amendment claim does not arise, for example, where the United States acquires tribal land held by use and occupancy (aboriginal title), as contrasted with "recognized" or reservation title, no matter what the circumstances. *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955); *United States* v. *Alcea Band of Tillamooks,* 341 U.S. 48 (1951). A taking also cannot occur where, as in most instances, the tribe consents to the cession, generally by a treaty or agreement. A Fifth Amendment claim arises solely in the unique situation where the United States has expropriated reservation property under authority of Congress without the consent of the tribe and without the payment of fair value. In view of these limitations, this Court, the Court of

[11] The deadline for filing claims before the Indian Claims Commission was August 13, 1951 (25 U.S.C. § 70k), so the unidentified "dozen cases still pending" mentioned by petitioner also had to be pending in 1971, when *Confederated Salish and Kootenai Tribes* was decided. Since that case, like the Sioux claim, involved the unilateral acquisition of reservation land for an arbitrary price (*see* p. 11, *supra*), counsel in the dozen remaining claims did not need to await the Sioux decision before realizing the Fifth Amendment potential of their cases. Given this situation, it seems strange that none of the purported dozen new Fifth Amendment cases has surfaced during the past eight years.

Claims and the Indian Claims Commission, collectively, have heard and finally determined fewer than a dozen different just compensation cases involving Indian recognized title lands during the past 40 years. Another twelve major Fifth Amendment claims are not likely to have remained dormant pending the outcome of the slow-moving Sioux Black Hills claim.[12]

Petitioner's argument that this case will have a material impact upon pending or future Indian claims cases, therefore, is wholly without foundation.[13]

3. The Rule In Taking Cases Which Petitioner Advocates Would Deny Indian Tribes The Equal Protection Of The Law.

Petitioner urges the Court to adopt the minority view of Judges Bennett and Kunzig in the lower court

[12] Over 600 claims were filed with the Commission by Indian tribes, bands and groups before the statutory deadline of August 13, 1951. Final Report of the United States Indian Claims Commission, August 13, 1946-September 30, 1978, p. 5. By the time the Commission's life expired, virtually all of the major land claims had been litigated, and the cases transferred to the court below most frequently covered accountings. *Id.* at 18-20. The "dozen cases still pending," to which petitioner refers, therefore, assuming they exist, must involve relatively minor land takings subsumed within a general accounting.

[13] Section 2 of the Indian Claims Commission Act covers claims arising before August 13, 1946, which had to be filed by August 13, 1951. 25 U.S.C. §§ 70a, 70k; *see* n.11, *supra.* Section 24 of the Indian Claims Commission Act authorizes the Court of Claims to hear and determine Indian claims arising after August 13, 1946 "under the Constitution, laws or treaties of the United States . . . ." 28 U.S.C. § 1505. Presumably, the Court of Claims seldom will receive land taking cases. In the modern era, Congress would break an Indian treaty without payment of fair market value only under the most extraordinary circumstances, since "[g]reat nations, like great men, should keep their word." *Federal Power Comm.* v. *Tuscarora Indian Nation, supra,* 362 U.S. at 142 (1960) (Justice Black, dissenting).

that, if Congress promises any payment for the unilateral acquisition of tribal recognized title lands, no matter how arbitrary or inadequate the amount, the courts may not question legislative wisdom and, therefore, may not determine that a taking has occurred for which just compensation is required under the Fifth Amendment. The dissenting opinion below is based upon the premise that, under *Lone Wolf,* Congress' exercise of its plenary power over Indian lands raises a political question. The dubious concept [14] that legislative action is thereby immunized from judicial scrutiny, however, was laid permanently to rest in Indian cases by this Court, at the request of the Solicitor General, in *Delaware Tribal Business Comm.* v. *Weeks,* 430 U.S. 73, 83-4 (1977). Specifically, the Court declared in *Delaware*:

> The statement in Lone Wolf, supra . . ., that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government," however pertinent to the question then before the Court of congressional power to abrogate treaties [citation omitted], has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. See, e.g., Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed. 2d 290 (1974). "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." (430 U.S. at 84; citations omitted.)

The Court of Claims thus held correctly that the Act of February 28, 1877, *supra,* which effected the uni-

[14] *See* Henkin, "Is There a 'Political Question' Doctrine?", 85 Yale L.J. 597 (1976); Tribe, *American Constitutional Law,* 71-79 (1978).

lateral acquisition by the United States of the Sioux Black Hills country, similarly was open to judicial scrutiny to determine whether such legislation violated the just compensation clause of the Constitution.

Any other result would deny respondents the equal protection of the law.[15] The standard rule in condemnation cases is, of course, that the owner of acquired property has a right to receive its fair market value as of the date of taking, plus interest as a measure of just compensation from such date to the date of payment. In arguing that the Sioux should be denied just compensation, petitioner proposes a new rule saying, in effect, that the United States owes a significantly lesser constitutional duty to Indians, for whom it acts as trustee, then it owes to other citizens, for whom it has no special obligations.

Such a rule simply cannot be justified. No person other than an Indian tribe would be subject to this disability in eminent domain cases. Apart from the obvious denial of equal protection involved, the rule would reverse the "overriding duty of our Federal

[15] Petitioner's proposed rule also would deprive Indian tribes of a right to any recovery if, in a contemporary treaty abrogation, Congress were to make some payment for reservation land, but substantially less than its fair market value. The Court of Claims has jurisdiction over Fifth Amendment takings arising after August 13, 1946. *See* n. 13, *supra.* The court below, however, does not have jurisdiction over unconscionable consideration or fair and honorable dealings claims. *Menominee Tribe of Indians* v. *United States,* —— F.2d —— (Ct. Cl., October 17, 1979) (slip op. at 8). Petitioner thus would take the courts back to the days before passage of the Indian Claims Commission Act when Indian tribes had to seek special jurisdictional acts in order to have their claims determined—the very practice which Congress, in 1946, intended to end.

Government to deal fairly with Indians." *Morton* v. *Ruiz,* 415 U.S. 199, 236 (1974). Indeed, if any special rule were appropriate, Indian property rights would be entitled to greater than ordinary protection since, as was stated in *Seminole Nation* v. *United States,* 316 U.S. 286 (1942), under a "self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court," the Government's conduct towards Indian tribes must be "judged by the most exacting fiduciary standards." 316 U.S. at 296-7.

Finally, in a further effort to cloak this case with a significance which it does not possess, petitioner argues that the Sioux award "represents a substantial and unwarranted charge against the public fisc and invites like awards in other pending cases" (Pet. 8, 13).[16] The reason why the judgment in this case is so large is that the Government has waited more than 102 years to pay just compensation. The lesson to be learned from such a situation is that the United States should pay its debts on time, not that the victims of delay should be denied their Fifth Amendment rights.

---

[16] As is pointed out at pp. 13-15, and ns. 12 and 13, *supra*, the decision below is not likely to have a material impact upon either pending or future Indian land claims cases. Petitioner's observation that the award of interest "multiplies the basic award six-fold, to reach a total of some $105 million" (Pet. 13), is equally inappropriate. During the period 1877 to September 1979, the Consumer Price Index escalated from 32 to 223.4 (on a base of 1967=100), so that the purchasing power of the dollar has dropped seven-fold and the basic award with interest today is worth less than the fair market value of the Black Hills when taken.

CONCLUSION

For the foregoing reasons, respondents urge that the petition for a writ of certiorari be denied. Alternatively, respondents suggest that the petition be granted and that the decision below be summarily affirmed on the authority of *United States* v. *Klamath and Moadoc Tribes, supra,* and *Shoshone Tribe* v. *United States, supra,* as illuminated by *Delaware Tribal Business Comm.* v. *Weeks, supra.*

Respectfully submitted,

ARTHUR LAZARUS, JR., ESQUIRE
Fried, Frank, Harris, Shriver
& Kampelman
600 New Hampshire Avenue, N.W.
Suite 1000
Washington, D.C. 20037
(202) 342-3624

Of Counsel:

MARVIN J. SONOSKY, ESQ.
Sonosky, Chambers & Sachse
2030 M Street, N.W.
Washington, D.C. 20036

WILLIAM HOWARD PAYNE, ESQ.
1086 National Press Bldg.
14th & F Streets, N.W.
Washington, D.C. 20045